United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7352

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76- 7352-53

NADINE MONROE, et al, Appellants, v. L. PATRICK GRAY, et al, Appellees

and

HARRY CONGDON, et al, Appellants, v. L. PATRICK GRAY, et al, Appellees

B P/S

APPELLANTS' REPLY BRIEF

and APPENDIX

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REPLY STATEMENT OF THE CASE

Defendant state officials have raised the defense of judicial immunity and that no valid antitrust claim was stated; the local lawyer and private individual defendants have argued that the Complaint failed to state a cause of action and similar antitrust arguments. In the reply brief, the plaintiffs submit additional new arguments now available to them bearing on the lack of immunity of these defendants and that the Complaints state a cause of action.

ARGUMENT

A. JUDICIAL IMMUNITY DOES NOT APPLY TO THESE DEFENDANTS

1. It has been argued that the defendant members of the New London County and Hartford County Grievance Committees, have quasi-judicial immunity or "prosecutorial immunity." The County Grievance Committees, however, have only ministerial functions to perform in the prosecution of errant lawyers, whose function is merely to present to the County Superior Court, for processing of a formal Presentment (see Presentment re Richard H. Wagner, Appendix, p. A-1). "The court imposes upon the State's Attorney the duty of prosecuting the complaint." Grievance Committee v. Broder, 112 Conn. 265. "The complaint made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem it to require." (In re Peck, 88 Conn. 447, 452, 91 Atl. 274) not for "punishment of the attorney but the protection of the Court, the profession of law and of the public against offenses of attorneys which involve their character, integrity and professional standing." Grievance Committee v. Broder, supra, which goes on to hold that "The grievance committee is in no sense a party to the proceeding but an independent public body charged with the performance of a public duty in a wholly disinterested and impartial manner..." "The disciplinary proceeding is undertaken not as a prosecution, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." In re Peck, supra.

There is no judicial discretion exercised by the Grievance Committee, since "the State's Attorney is bound to present the complaint to the court with the utmost fairness and to the best of his ability. Whatever justice, in his best judgment, requires, that he must do." "Even the action of the Grievance Committee in reprimanding an attorney does not prevent the superior court from taking jurisdiction of the same complaint." In re Herman N. Horwitz, 21 CS 363. Obviously, the Grievance Committees' function is clerical or ministerial.

2. In further support of the argument that the Grievance Committees do not have prosecutorial immunity, because the State's Attorney "presents" the grievance, reduced to a "complaint" to the state court. There is the process in the U. S. District Courts for discipline of members of the District Court bars, wherein the U. S. Attorney makes a "presentment" of the disciplinary matter to the Court, after investigation, after it has been brought to his attention. In the District of Connecticut, this may be done, according to the Local Rules, by a District Judge, but, in the instant cases, the court below refused to follow this procedure, and denied the plaintiffs' motion to have the U. S. Attorney investigate the felonies that L. Patrick Gray had admitted.

3. Ministerial or clerical state officers' functions are not cloaked in judicial immunity; the defendants cannot claim the immunity granted to judges in Pierson v. Ray, 386 US 547. A judge (and Grievance Committee members) can also be sued for failing to perform administrative acts in violation of the constitutional rights of certain citizens. In Bramlett v. Peterson, 207 F. Supp. 1311 (M. D. Fla, 1969), Florida justices of the peace were sued under 42 USC Sec. 1983 for failing to inform indigent misdemeanants of the right to court-appointed counsel before trial and for failure to appoint an attorney for them in the absence of an intelligent and voluntary waiver. Against a claim of judicial immunity the court held that since "the right's guaranty is particularly clear, there is no infringement of the judicial function or judicial discretion..." So F. Supp. at 1332. Doe v. County of Lake, Indiana, 399 F. Supp. 553 (1975). The next sentences are directly applicable in this case. "The plaintiffs' complaint in the instant suit is directed soley at

the administrative and ministerial duties of the defendant(s). Judge Richards, as "Chief Judge of the Lake County Superior Court is generally responsible for the administration of the Court...In addition, plaintiffs seek to change various procedures regarding the 'processing' of..." At 557. In this case, the appellants seek an injunctive enforcement of the Grievance Committee members' responsibility to perform the clerical or administrative function of reducing the general public's and plaintiffs' and even the American Bar Association's grievances (in the case of defendant L. Patrick Gray's crimes) to writing (in the proper language) so that the State's Attorney may prosecute according to Broder. In the Doe case, the defendant judge was ruled to be "an integral part of the system that appointed and ministered the Public Defender system in Lake County." At 557. In the instant case, the Grievance Committees are an integral part of the administration of the disciplinary procedure, and thus are subject to suit for injunctive relief, and monetary damages, if they fail and refuse to perform the ministerial function.

4. After complete historical review of judicial immunity in Littleton v. Berbling, 468 F. 2d 389 (7th Cir. 1972), reversed on other grounds sub nom., O'Shea v. Littleton, 414 US 488, 94 S. Ct. 66, it was held:

> "The legislative history (of the Civil Rights Acts, 42 USC Sec. 1983) presents a strong case for finding that most immunities were meant to be swept away, at least for intentional deprivation of a class's rights." At 403.

Because of the shocking failure of the New London County Grievance Committee to process the material complaints against L. Patrick Gray, the lack of any trust in local grievance committees displayed by lawyer Hyman Wilensky, the Vice President of the New London County Bar Association in the article appearing in the Hartford Courant October 20, 1976 in which he called for state-wide grievance committees, to "avoid cronyism and prejudice," made up of "nonlawyers and lawyers who are from other counties of the state," "because local Grievance Committees "are not doing a good job" (State Bar Backs Grievance Plan, p. 2, this Appendix), it can be said that the class pro se litigants with grievances and the general class litigants with grievances

are being deprived of their rights, and therefore, according to Littleton v. Berbling, id, "in sum, those courts which have considered the issue have held that when a class-discrimination is alleged, judicial officers may be enjoined." At 418.

5. In circumstances involving knowing deprivations of a class's rights, Doe holds that "Therefore, it is entirely appropriate and proper for these particular defendants, (judges) Richards and Meszer, to be sued in their individual, as well as their official, capacities." In cases where state officers, who could have known, or should have known, that they were "invading, abridging, or denying the plaintiffs' constitutionally-guaranteed rights, privileges, or immunities" operated in full compliance with state law, they were found to be not only subject to injunctive restraint, but subject to punitive as well as compensatory money damages. Goss v. Lopez, 95 S. Ct. 729, Wood v. Strickland, 43 LW 4293. (1975).

6. The Doe case, and the cases cited therein, establishes clearly that ministerial failings of state officers make them liable to suits. Repeated (almost universal) failure of the Grievance Committees to inform those filing grievances (and the named lawyers) of the fate of their grievances, complained of in the Complaints at issue and the refusal of the Grievance Committee members to inform plaintiffs Monroe, Congdon, and Lebovitz of their due process right to proceed in the Superior Court against their former lawyers under Connecticut Statute, Section 51-90 (see Complaints, Paras. EEE and M, respectively, pp. A-13, A-20) are ministerial failings,denials of due process of law, that are not only not protected by judicial immunity, but constitute claims upon which federal relief, via money damages, can be claimed. Likewise, the refusal of defendant state Judge Santaniello to meet his responsibilities under law, when plaintiff Monroe brought the failings of the Grievance Committee to his attention was not an abuse of judicial discretion, but a failure of this defendant to meet his ministerial or administrative responsibilities, and therefore he is subject to at least injunctive sanctions, under 28 USC Sec. 2283, if not money damages.

B. CLAIMS UPON WHICH RELIEF CAN BE GRANTED

1. Defendants have overlooked a great many concrete claims upon which federal relief has been granted in the past. In addition to the gross denial of protection to the general public, the courts, and the plaintiffs specifically by the refusal of the Grievance Committees to present the grievances discussed in the complaints to the Superior Court, this Court should consider the pattern of denial of due process of law, of which the following instances are illustrations:

a. Monroe Complaint, Para. DDD (p. Record A-12): the limitations in the letter instructing the Arpins that "You are not to make further complaints to any commission or committee, nor are you to threaten or attempt litigation" are nothing more or less than a denial of due process of law by officers of the courts, acting under color of law, and able to deny the Arpins due process of law, and the First Amendment right to petition for redress of grievances, only by virtue of the power of their position or office as officers of the courts. Here this Court should consider that, to the layman, a lawyer's statement that a person may not file a grievance, no matter how false or illegal, is usually accepted as gospel, because the layman client of a lawyer believes, as far as his taking any action, or failing to take any action, is concerned, that the lawyer is a court official. To the layman client, the lawyer is cloaked in the authority of the state. The layman knows that only the lawyer can practice law, and he hires the lawyer to tell him what to do, believing that the lawyer, like a judge or policeman, is required to tell him what to do, and he may go to jail if he does not obey the lawyer, just as he may go to jail if he does not do what a judge or policeman tells him to do. Resisting a lawyer's instructions is tatamount to resisting arrest, to the average layman. For any court to rule that lawyers do not have the power to tell their clients what they must do, and are not backed by the power of the state, because the lawyers are not officers of the Court, but merely private citizens licensed to file papers, is to ignore the very real power that lawyers exert memrely because their clients think

the lawyers are state officers, and the state judges permit the lawyers to exercise the powers of state officers. After the client sheep have been slaughtered, or at least sheared, by lawyers posing as slaughterhouse officials authorized to fleece them of their precious rights, it is unjust to rule that lawyers do not have at least de facto powers as state officers.

b. The Monroe Complaint, Para. EEE, and Congdon Complaint, Para. F, (Appendix, pp. A-13, A-19) describe defendant Colleran's action in attaching property without notice or opportunity to be heard. The denial of property rights without the essential elements of due process of law of notice and opportunity to be heard have been ruled unconstitutional since Sniadach v. Family Finance, 89 S. Ct. 1820, Lynch v. Household Finance, 92 S. Ct. 1113, Tucker v. Maher, 92 S. Ct. 1498, Fuentas v. Shevin, 407 US 67, Bay State Harness Horse Racing and Breeding Association v. PPG Industries and Hannon, Register of Deeds, 365 F. Supp. 1299, Schneider v. Margosian, F. Supp. ___, and Howard v. Kunen, Dist of Mass. No. 73-3318, Dec. 3, 1973, unreported. Both Lynch and Tucker were District of Connecticut cases, Tucker decided by the same District Judge that dismissed the instant cases; the Howard case established the right to money damages for denial of the due process elements of notice and hearing before deprivation of property rights, making such deprivation a claim upon which monetary as well as injunctive relief can be granted in a U. S. District Court.

c. The right to an impartial tribunal has been established in Mayberry v. Penna., 91 S. Ct. 499, in which it was ruled that a judge could be incapacitated from ruling fairly and justly because of bias or prejudice against a litigant. Connecticut referees can be incapacitated by age and deprived of their impartiality by the necessity of pleasing the lawyers who select them in order to be chosen for the lawyer's next complicated case, and thus earn another fee.
In Connecticut it is mandatory for judges of the Superior Court to retire at the age of seventy. At that time, almost without exception, judges chose to become state referees, serving in this capacity for the rest of their lives, many well into their eighties. State referees are no longer periodically reviewed as to

fitness and then reappointed by the Connecticut General Assembly as in the case of judges. Connecticut General Statutes, Section 52-434 provides:

> "Superior Court has no power to refer any matter to a state referee unless all parties consent." 16 CS 460. Cited. 30 CS 354.

Litigants must not only agree to have their case heard by a state referee but they have the right to select the referee they wish to hear the case. The regular judges are, in open court, rubber-stamping the routine no-fault divorces and the complicated contested divorces are being funneled to state referees, where the proceedings are not open to public scrutiny, simultaneously perpetuating the patronage system and double standard of justice. Referees dependent upon attorney good-will for their employment are subject to pressures not felt by regular judges.

Prior to legislative change effective October 1975, the Judicial Review Council charged with processing complaints against judges, refused to investigate complaints against state referees acting as judges, classifying the referees as judicial "employees" not within their jurisdiction, leaving the referees accountable to no official agency.

In addition to the removal of the periodic scrutiny that judges receive and the beneficial effects of the public glare in open court, referees are <u>older</u> than judges, and thus even more likely to be senile than the judges who are openly criticized for being senile. (See Connecticut Magazine, May , 1976, Appendix p. 3). A senile, partial tribunal is a denial of due process of law, and a claim upon which federal relief can be granted.

d. Defendants' lawyers are still claiming that the antitrust violations are not claims upon which federal relief can be granted, even after the United States has claimed relief for the general public, including the plaintiffs, from the American Bar Association and its coconspirators, the defendants herein, for anti-trust violations described with the same exactitude as in the Complaints, in <u>U. S. v. American Bar Association, No. 76-1182, District of Columbia</u>, (see Appellants' Appendix, pp. A-25).

C. OTHER NEW MATTERS

1. Since the Appellants' brief was prepared, Attorney Richard C. Post has been charged with grand larceny of nearly a hundred thousand dollars of accounts over which he had fiduciary responsibility only because he was a "Commissioner of the Superior Court" of Connecticut, and because the New London County Grievance Committee failed to act, as it has failed to act on the matters described in the Verified Complaints, on the grievances filed by an earlier victim in 1974. It is fair to say, and should be of guidance to this Court, that if the New London County Grievance Committee members had been required to perform their ministerial function in 1974, Attorney Post would not have continued as as Attorney, "Commissioner of the Superior Court" and his current victims would not have been fleeced. Since a person is responsible for the natural consequences of his acts, Monroe v. Pape, 365 US 167, the Grievance Committee members should be held pecuniarily responsible for these latest losses, for not processing the earlier grievances, and relieving Attorney Post of what has been described, all too correctly, as his "license to steal." This Court should consider that lawyers are the only professional (or businessmen, or practioners of an interstate trade (Goldfarb v. Virginia Bar Association, 95 S. Ct. 2008) who are granted the power to take possession and control of their clients' funds and who are subject to such elaborate disciplinary proceedings, confirming their de facto and de jure positions as "state officers," as compared to other licensees of the state, such as Registered Professional Engineers, physicians, dentists, crane operators, X Ray technicians, hair dressers, surveyors, and embalmers.

2. If lawyers are not considered state officers, they are certainly claimed, in the Verified Complaints, to be private individuals "acting in concert" with state officers, the Grievance Committee members, in the invasion of the plaintiffs' constitutionally-guaranteed rights, privileges and immunities. "This may be minimum pleading, but, by modern standards, it is sufficient to withstand a motion to dismiss." Denman v. Shubow, C. A. 1, Dec. 14, 1967, unreported, reaffirmed,

413 F. 2d 258. The Verified Complaints make the claim that the defendants "combined and confederated" to injure the plaintiffs in their precious rights, and this was sufficient to cause the American Bar Association, with its tremendous legal resources, to Answer in United States v. American Bar Association, supra, rather than to move for dismissal for "failure to state a claim upon which relief can be granted." Plaintiffs, pro se, do not have the legal resources of the American Bar Association, but they have stated claims upon which relief can be granted, or they can amend to state those claims, if allowed.

CONCLUSION

These cases should be remanded to the district Court, for discovery and trial, because there is no judicial immunity from the ministerial acts of the defendants, and the Verified Complaints can be read as stating claims upon which relief can be, and should be granted.

By the Appellants, pro se

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CERTIFICATE OF SERVICE

I certify that I have mailed, first class prepaid, two copies of the above reply to the attorneys for the appellees this date, November 16, 1976.

Nadine Monroe
Nadine Monroe

TO THE SUPERIOR COURT WITHIN AND FOR THE COUNTY OF NEW LONDON, now in session, at New London, comes Edmund W. O'Brien, State's Attorney for the County of New London, and makes presentment to said Court,

That RICHARD H. WAGNER of East Lyme, a member of the Bar of said New London County, has been guilty of misconduct not occurring in the actual presence of the Court involving his character, integrity, and professional standing and conduct and complains and says:

1. That said Wagner on March 25, 1974 was appointed Conservator of the Estate of Francis J. Erwin by Judge Daniel E. Kenny of the Probate Court for the District of Old Lyme.

2. That between April 5, 1974 and April 22, 1975 at New London and East Lyme said Wagner embezzled and converted to his own use Six thousand fifty ($6,050.00) dollars or more in cash which was the property of said Estate of Francis J. Erwin.

3. That the conduct of said Wagner in embezzling said funds from said Estate constitute a violation of his professional duties in that it is inconsistent with Canon 1, Ethical Consideration 1-5, and Disciplinary Rule 1-102 of the Code of Professional Responsibility.

WHEREFORE, said State's Attorney prays that a rule may issue to the said Richard H. Wagner to appear and show cause why he should not be disbarred or otherwise disciplined and that such proceedings may be had on this complaint as is provided by law and the rules of the Court.

DATED at New London, Connecticut, this 29th day of April, 1975.

/s/ Edmund W. O'Brien
State's Attorney for
New London County

State Bar Backs Grievances Plan

By THOMAS D. WILLIAMS

The Connecticut Bar Association (CBA) voted Tuesday to recommend a statewide grievance committee to resolve clients' complaints against lawyers.

By a narrow voice vote, the association's assembly and house of delegates passed a motion to urge the rule-making judges of Superior Court to form the statewide grievance committee.

The committee, with a full-time investigative and clerical staff, is proposed to replace the part-time staffs of individual grievance committees in the state's eight counties.

New London attorney Hyman Wilensky, who first asked for the new committee just before the close of the delegates' meeting, said it was about time that either the judges or the legislature acted to help the legal consumer.

Wilensky, who is vice president of the New London County Bar, said privately he knew of situations in his county in which the local grievance committee failed to ever inform either the complaining client or the charged lawyer about the outcome of the complaint.

If a grievance committee is to avoid "cronyism and prejudice," Wilensky said after the meeting, it must be made up of nonlawyers and lawyers who are from other counties of the state. "It's about time," he added, "that judges and lawyers stop sweeping this issue under the rug."

Wilensky's proposal was hotly opposed by Hartford County Bar President Robert F. Taylor, who was just about to leave the delegates' meeting when he learned of it. Taylor said the same proposal was rejected by a 10-to-three vote of the Connecticut Council of Bar Presidents, a group made up of local and county bar association presidents.

Taylor also opposed Wilensky's motion on technical grounds because he said most of Hartford County's delegates had left the Hartford Hilton meeting because they thought it was over. "I've got 30 delegates who've now gone and now you want to push a vote through. It's not cricket!" he said.

Hartford attorney William K. Cole, who seconded Wilensky's motion, said a statewide grievance procedure was approved by the CBA board of governors several years ago. Cole said that such committees were operating in 46 of 50 states.

Bar authorities said the judges' rules committee has never acted on the CBA recommended grievance procedure and a bill for the statewide committee was filled before it got to a vote in the state legislature.

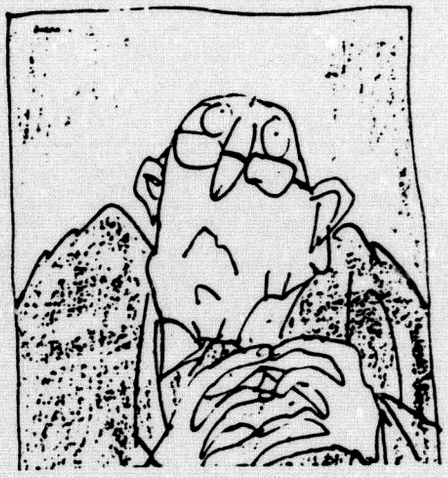
Outgoing CBA President Carmin R. Lavieri told the delegates that understaffed grievance committees in the small counties "are not doing a good job." Immediately one delegate exclaimed, "You're being polite."

Hartford Courant
October 20, 1976

Lords of the Bench

By Mary-Lou Weisman

In twenty-six states, judges run for the bench as politicians run for office; in sixteen, they are picked by a committee of citizens; in three, they are selected by the state legislature; in Connecticut, none of the above. Here, the reigning governor hand-picks the judges right off the party rack. Once appointed, they become the patroons of justice, presiding over Connecticut courtrooms with manorial privilege.



The problem with writing a story about the quality of justice in Connecticut is that nobody in the profession wants to talk about it. When it comes to discussing the competence of judges, justice becomes mute as well as blind. For a *Connecticut* Magazine article on the subject, this reporter conducted approximately eighty interviews with judges, lawyers, and bar administrators: not one was willing to go on record as critical of the state judicial system. As a result of what seems to be a self-imposed gag order, the critical information in this article is largely the result of not-for-attribution comments that surfaced in almost every interview.

Why the paranoia? Is the Connecticut judiciary hiding something embarrassing behind its solemn, black robes? Apparently not. According to one anonymous lawyer, "The problem with the Connecticut judiciary is not that it is steeped in scandal, but that it is mired in mediocrity."

Judicial mediocrity and incompetence in Connecticut are manifested primarily in the area of judicial temperament. Documented evidence of capricious judicial arrogance, racial prejudice, and just plain craziness are legion. Consider the following excerpt from a transcript of a recent New Haven trial.

Lawyer: If your Honor please, I would ask the bond to be set at $1,000.

Judge: $10,000.

Lawyer: One week, your Honor? [requesting an extension]

Judge: Continued one week. I'll change my mind on that; $15,000.

Lawyer: If your Honor please, what is the purpose of raising the bond?

Judge: Well, we have a very unhappy defendant here.

Lawyer: I can see why he is unhappy with a $10,000 bond.

Judge: If you are unhappy, too, I will make it $15,000.

According to public defenders, such instances of whimsical nastiness occur most frequently when the defendants are indigent.

At least two Connecticut judges either don't understand or don't like the new divorce laws, according to a Fairfield County lawyer who handles a significant number of matrimonial cases. Both judges conduct uncontested dissolution of marriage hearings as though the law requires proof of fault and the testimony of three witnesses, despite the fact that the relevant statutes were amended to a "no fault" system three years ago. And there is no way to stop them.

And, as should be anticipated in a job where the average age is fifty-seven and the majority of practitioners are in their sixties, the senile or deaf judge is also a real problem. One judge, now retired, was so out of it that many of his cases resulted in mistrials that cost the taxpayers money, the courts time, and the litigants anguish.

Another judge did not enhance the dignity of the courtroom by sucking a lollipop on the bench and responding to court opening procedures with the announcement: "Oyez, oyez, my ass."

At least two senile judges refused to take early disability retirement as suggested by colleagues, and continued on the bench until they reached the mandatory retirement age of seventy.

Being a judge is demanding and exhausting work; a life sentence of listening to human woes, conflict, and brutality. The rigors of the job bring out the best in some and the worst in others. At the very least, it would seem that the state ought to protect the judges and the public they serve by requiring the judges to submit to a physical and mental examination annually. The proper use of the results of such examinations would go a long way toward relieving the system of individuals who are not villains, but have become physically or emotionally incapable of performing their duties.

The above examples by no means indict the Connecticut judiciary as a whole, but they are enough to raise serious questions about the manner in which judges are selected in the first place and why, in spite of repeated instances of poor judicial conduct and incompetence, they remain on the bench, undisciplined.